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Estates, Trusts, and Wills

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ESTATES, TRUSTS, AND WILLS

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Four recent cases concerning estates, trusts, and wills have reached the Montana Supreme Court: *Ziegler v. Kramer*,[1] *Burr v. Department of Revenue*,[2] *Boatman v. Berg*,[3] and *In re Estate of Sample*.[4] The first three cases offer no significant changes from earlier decisions. Accordingly, analysis of them will be limited to the facts presented and to how each fits within existing law. In *Sample*, the court interpreted the Uniform Probate Code in a way that limits the usefulness of a self-proving affidavit attached to a will. A discussion of *Sample* suggests a course the court could have taken.

I. *Ziegler v. Kramer*

Following the publication of the first notice to creditors of the decedent's estate, the plaintiffs presented a claim for services rendered to the decedent. Although the plaintiffs admitted that they had given their assistance without any expectation of payment, they produced a writing signed by the decedent which they claimed gave them certain money deposited in a Billings bank. The personal representative rejected the claim and plaintiffs filed suit in district court on the theory that the writing evidenced an implied contract between the plaintiffs and the decedent. After the personal representative moved for summary judgment, the plaintiffs filed a motion to amend and add a supplemental complaint based on the theory that the decedent had made a gift to them of the bank account. By the time of the supplemental pleading, more than ten months had passed since publication of the first notice to creditors of the estate. The plaintiffs' motion was denied and motion for summary judgment was granted.

On appeal, the Montana Supreme Court affirmed the district court's action. The court noted that filing a creditor's claim with an estate within four months of the first publication of notice to creditors is a prerequisite to an action on that claim in district court.[5] This four-month statute of limitation is codified at Montana Code Annotated [hereinafter cited as MCA] § 72-3-803 (1)(a) (1978).[6] The plaintiffs attempted to add an alternative theory of recovery at

1. ___ Mont. ___, 573 P.2d 644 (1978).
2. ___ Mont. ___, 575 P.2d 45 (1978).
3. ___ Mont. ___, 577 P.2d 382 (1978).
4. ___ Mont. ___, 572 P.2d 1232 (1977).
5. ___ Mont. at ___, 573 P.2d at 645.
6. Formerly codified at REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 91A-3-803(1)(a).

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the district court level on the premise that the writing represented an attempt by the decedent to make a gift to them. The implied contract action pleaded in the original complaint failed as a matter of law because the plaintiffs' services admittedly were rendered without expectation of payment.[7] Because the gift theory of recovery was not within the scope of the implied contract theory, it was barred. The district court concluded that the claim had not been presented to the personal representative within the statutory period of four months and the supreme court agreed.

Ziegler exemplifies the compatibility of the Uniform Probate Code with pre-Code law in Montana regarding presentation of claims to the administrator of an estate. In *Brown v. Daly*,[8] a 1906 case, it was held that an amended complaint cannot set up a new cause of action unless the claim upon which the action is based has first been presented to the executor. The plaintiff in *Brown* presented a claim to the executrix of the Daly estate. The claim was based on a contract for deed in which the plaintiff and his wife were joint owners of the property being sold. After the plaintiff's claim was rejected, he commenced an action in district court to recover his share of the amount due on the contract. An amended complaint was subsequently filed joining the plaintiff's wife as a party and demanding the full amount due on the contract. Judgment was rendered in the defendant's favor because the amended cause of action was barred by the four-month statute of limitation because it was different from the claim presented to the executrix. The judgment was affirmed on appeal. The Montana Supreme Court found that the plaintiff had treated the claim as a several contract when presented to the executrix, although it was in fact a joint contract because both plaintiff and his wife owned the property. The court concluded that, by amending the claim to a joint contract action in district court, the plaintiff had tried to circumvent the statutory system which permits an action to be brought in court only after the identical claim had been presented and rejected by the administrator of the estate.

One purpose of the Uniform Probate Code is to expedite the settlement and distribution of estates with minimal involvement by the courts.[9] To recover on a claim against an estate, a creditor must act within four months of the time the personal representative first publishes notice to creditors.[10] The claim must be presented to the

7. ___ Mont. at ___ , 573 P.2d at 645.

8. 33 Mont. 523, 84 P. 883 (1906).

9. UNIFORM PROBATE CODE, art. 3, pt. 8, Editorial Board Comment.

10. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 72-3-803 (1)(a) (1978) (formerly codified at R.C.M. 1947, § 91A-3-803 (1)(a)).

personal representative, who determines whether the claim will be paid. A creditor may then appeal the rejection of a claim by filing an action in district court, but, as shown by *Ziegler*, the grounds for recovery must be precisely the same as those presented to the personal representative within the allotted time.

II. *Burr v. Department of Revenue*

Joyce and Robert Eggert owned certain property in joint tenancy. Joyce died on August 14, 1972, and Robert died on August 15, 1972. Inheritance taxes were paid on the joint property by both Joyce's and Robert's estates on August 21, 1973. The plaintiff, the sole surviving heir, filed for a refund of the amount paid by Joyce's estate pursuant to what is now MCA § 72-16-318 (1978).[11] This statute had been amended subsequent to the deaths of the Eggerts but prior to the payment of inheritance taxes on their estates.[12] The 1973 amendment allows a credit against inheritance taxes in certain instances when the wife predeceases the husband. Prior to the amendment the credit was available only when the husband died first.

The district court determined that the statute as amended was applicable and granted the refund. In reversing this ruling, the Montana Supreme Court held that in the absence of specific language from the legislature requiring application of the 1973 amendment retroactively, the amount of inheritance tax was determinable according to the language of the statute in effect at the time of death. Quoting from an earlier Montana opinion,[13] the court reemphasized the important rule that a state's right to an inheritance tax vests immediately upon death. The court further said:

> An inheritance tax accrues at the same time the estate vests, that is, upon the death of the decedent. All questions concerning the tax must be determined as of the date of decedent's death. The right of the state to an inheritance tax vests immediately upon the decedent's death, although at that time the state may not know the amount of the tax.[14]

The *Burr* case comports with existing law and in addition to the rule

11. Formerly codified at R.C.M. 1947, § 91-4414(5) (Supp. 1977).

12. MCA § 72-16-318 (1978) (formerly codified at R.C.M. 1947 § 91-4415(5) (Supp. 1977)) provides:

> Any child of a decedent is entitled to credit for so much of the tax paid by the decedent's spouse as applied to any property which is thereafter transferred by or from such spouse to the child, provided the spouse does not survive the decedent to exceed 10 years.

13. In re Clark's Estate, 105 Mont. 401, 424, 74 P.2d 401, 412 (1937).

14. ___ Mont. at ___, 575 P.2d at 47.

on vesting of the state's right to receive taxes, the case will undoubtedly be cited as additional precedent for the rule that amendments will not be effective retroactively unless the legislature specifically so directs.

III. *Boatman v. Berg*

The plaintiff's husband died in 1959, leaving an estate consisting mostly of real property. The property was heavily encumbered. The plaintiff asked the defendant, her older brother, to help with the administration of the estate. During a five-year period the plaintiff assigned her interest in four separate tracts of land to the defendant, who paid off the full amount owing each time.

The plaintiff brought an action seeking a declaration that the defendant held the land conveyed to him in constructive trust for her benefit. The district court denied the relief requested and quieted title to the land in the defendant, finding that there had been no clear and convincing proof of any wrongful act by the defendant.[15] The court also found that each transfer of property was supported by adequate consideration in the form of cancellation of indebtedness.

The theory of the plaintiff's case was based on the combined effect of four relevant statutes.[16] She contended that the defendant had voluntarily assumed a relationship of personal trust and confidence, thereby making him a trustee.[17] As such, he was by law "bound to act in the highest good faith"[18] toward the plaintiff, and all transactions between the parties that benefited defendant must be presumed to have been entered into without sufficient considera-

15. Proof of wrongful act is required under MCA § 72-20-111 (1978) (formerly codified at R.C.M. 1947, § 86-210), which provides:

> One who gains a thing by fraud, accident, mistake, undue influence, the violation of trust, *or other wrongful act,* is, unless he has some other or better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. (Emphasis added.)

16. MCA §§ 72-20-105, 111, 201, and 208 (1978) (formerly codified at R.C.M. 1947, §§ 86-205, 210, 301, and 308).

17. MCA § 72-20-105 (1978) (formerly codified at R.C.M. 1947, § 86-205) provides:

> Every person who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control.

18. MCA § 72-20-201 (1978) (formerly codified at R.C.M. 1947, § 86-301) provides:

> In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

tion and under undue influence.[19] Because of this presumption, the plaintiff urged the imposition of a constructive trust for her benefit on all property she had conveyed to defendant.

The Montana Supreme Court disposed of the plaintiff's contentions by applying the precedent of *Roecher v. Story*,[20] in which the court said that if the same evidence being used to show a fiduciary relationship also shows that the trustee has acted in good faith and for the benefit of the *cestui*, the presumption of wrongdoing is not available. In *Roecher*, the plaintiff, as administrator of the decedent's estate, brought an action against the decedent's son for an accounting of certain property acquired by him while acting as trustee of his father's business. The plaintiff alleged that because the son ingratiated himself with the father by operating the father's business, a fiduciary relationship was formed from which the presumption arose that the son's acquisition of the father's property was the result of undue influence.

In *Boatman* and *Roecher*, the plaintiff attempted to avoid the burden of proving the defendant's wrongdoing merely by showing that a confidential relationship existed between the defendant and the trustor with the result that any transaction between them which benefits the defendant should be presumed to have been entered into without consideration and under undue influence. By statute,[21] such proof shifts the burden of showing good faith and the absence of wrongdoing to the defendant. In this kind of case, the plaintiff, while establishing the existence of a confidential relationship, must by the *same evidence* show bad faith and wrongdoing on defendant's part before the burden is shifted. The net effect is that the expressed requirement of a wrongful act as a prerequisite to the imposition of a constructive trust under MCA § 72-20-111 (1978)[22] is an implied requirement to the presumption of undue influence under MCA § 72-20-208 (1978).[23] Stated another way, the presumption of undue influence does not arise simply from a showing of a confidential relationship. An involuntary trust must first be established, which requires the showing of a wrongful act which benefited the person in the position of a trustee. If the same evidence which is introduced to show a confidential relationship also shows that the actions taken

19. MCA § 72-20-208 (1978) (formerly codified at R.C.M. 1947, § 86-308) provides: All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence.
20. 91 Mont. 28, 5 P.2d 205 (1931).
21. MCA § 72-20-208 (1978) (formerly codified at R.C.M. 1947, § 86-308).
22. Formerly codified at R.C.M. 1947, § 86-210.
23. Formerly codified at R.C.M. 1947, § 86-308.

benefited the person in the position of alleged trustor, then an involuntary trust will not be established and the presumption against trustees cannot be raised.

In its opinion, the court equates the term "fiduciary relation" with the term "confidential relation." Both terms were defined in *Kerrigan v. O'Meara*[24] as a relation founded "upon trust or confidence reposed by one person in the integrity and fidelity of another, and precludes the idea of profit or advantage resulting from the dealings of the parties and the person in whom the confidence is reposed."[25] The importance of such a relationship is its part in establishing a constructive trust. The constructive trust is a device used by courts to compel one who unfairly holds a property interest to convey that interest to another to whom it justly belongs.[26] Abuse of a confidential relationship is one ground for application of a constructive trust. To establish a confidential relationship a court must find the actual placing of trust and confidence on at least one occasion and a disparity of position of the parties. The person benefiting from the relationship must be in a weakened position or related in such a degree that great trust is naturally reposed in the other person.[27]

While the parties in *Boatman* were brother and sister, the issue of the existence of a confidential relationship was not addressed directly. The court found that in the transactions between the plaintiff and the defendant there was adequate consideration given in each and no proof of wrongdoing on the defendant's part. Without the element of unfairness, the existence of a confidential relationship is not enough to support a constructive trust.

IV. *In re Estate of Sample*

The petitioner instituted a proceeding for probate of a will and appointment of herself as personal representative of her father's estate. The petition was opposed by Calvin Sample, the incapacitated son of the decedent who was disinherited under the will. Grounds for the challenge were that the will failed to meet the formalities of execution as required by law. To be valid a will must be

> in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by at least two persons each of whom witnessed

24. 71 Mont. 1, 227 P. 819 (1924).
25. *Id.* at 6, 227 P. at 821.
26. G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 471 (2d ed. 1978).
27. *Id.*

either the signing or the testator's acknowledgment of the signature or of the will.[28]

The Sample will was signed by the testator on the second page, after the dispositive provisions, and was dated April 28, 1976. No other signatures appeared on this page. The third page of the will consisted of a self-proving affidavit following the form provided in the Uniform Probate Code.[29] The purpose of this type of affidavit is to allow a will to be probated without the testimony of any subscribing witnesses.[30] In the Sample will the self-proving clause was apparently signed by the witnesses in the mistaken belief that they were signing an attestation clause, although this is not made clear from the case. The form was also signed by the testator and dated April 28, 1976. Probate of the will was denied for lack of attesting witnesses' signatures in the form required by MCA § 72-2-302 (1978).[31]

The appellant argued before the Montana Supreme Court that the addition of the self-proved affidavit cured the defect in the will's execution, citing *Estate of Cutsinger*[32] as authority. In *Cutsinger,* the signatures of the witnesses to the will appeared after a self-proving clause on the same page as the will's last article. The proponent did not attempt to establish the will as self-proved. Instead, the two witnesses testified in court that the testatrix signed the will in their presence and that they signed as subscribing witnesses at testatrix's request in her presence and in the presence of each other. The will was upheld as meeting the formalities of execution. There is no indication from the facts of *Sample* whether the witnesses to the will gave any testimony. The *Cutsinger* court noted that such testimony would make a substantial difference.[33]

The court in *Sample* concluded that a self-proving document attached to a will signed only by the testator does not overcome the lack of compliance with the formalities of execution. The court relied on a Texas case, *Boren v. Boren,*[34] for its decision. In that case, a one-page will signed by the testator alone was denied probate even though an affidavit signed by two witnesses was attached. Citing the Texas Probate Code,[35] the court in *Boren* found that the only

28. MCA § 72-2-302 (1978) (formerly codified at R.C.M. 1947, § 91A-2-502).

29. MCA § 72-2-304 (1978) (formerly codified at R.C.M. 1947, § 91A-2-504).

30. MCA § 72-2-304 (1978) (formerly codified at R.C.M. 1947, § 91A-2-504), Editorial Board Comment.

31. Formerly codified at R.C.M. 1947, § 91A-2-502.

32. 445 P.2d 778 (Okla. 1968).

33. *Id.* at 781, 782.

34. 402 S.W.2d 728 (Tex. 1966).

35. TEX. PROB. CODE ANN. tit. 17A, § 59 (Vernon), provides in pertinent part that "[a] self-proved will may be admitted to probate without the testimony of any subscribing witnesses, but otherwise it shall be treated no differently than a will not self-proved."

purpose of a self-proving provision is to admit a validly executed will to probate without testimony from subscribing witnesses. The valid execution of the will was a condition precedent to the usefulness of a self-proving clause. The Montana court adopted this reasoning as the rule in *Sample*.[36]

Should probate of a will be denied automatically when it has a formal defect? One writer[37] has suggested that inquiry should first be made by the court into whether the noncomplying document expresses the decedent's testamentary intent. If it does, and the will sufficiently approximates the formal statutory requirements so as to enable the court to determine that the purposes of the applicable laws are served, the will should be upheld.[38]

The purpose of statutorily imposed formalities of execution is to prevent probate of a will that is a tentative, doubtful, or coerced expression of succession.[39] In the absence of proof going to the issue of testamentary intent, the method of attestation, by itself, should not preclude a will's admissibility, so long as there is a sufficient attempt to attest. The drafters of the Uniform Probate Code intended "to validate wills which meet the minimum formalities"[40] of execution while providing an alternative means of attestation in the self-proved will.[41]

Considering the minimal requirements necessary to comply with the formalities of execution, a finding of lack of compliance by the testator is difficult to understand, particularly where a self-proving affidavit has been attached. One explanation is that the parties signed what they thought was the attestation clause. Where this happens some courts have held that the will may still be valid:

> If the witness has the *animus attestandi* or intention to attest when he signs a will it should not matter whether he signs below an attestation clause or in a self-proving clause. This can only be determined by testimony of the witness when the will is offered for probate. Unless there is evidence of fraud or undue influence, this should be sufficient. The same effect is given where the witness signs the name of another as his signature. If he signs with the requisite intent the document is given legal effect.[42]

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36. ___ Mont. at ___, 572 P.2d at 1234.

37. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

38. *Id.* at 513.

39. T. ATKINSON, LAW OF WILLS § 62 (2d ed. 1953).

40. MCA § 72-2-302 (1978) (formerly codified at R.C.M. 1947, § 91A-2-502), Editorial Board Comment.

41. The Editorial Board Comment preceding ch. 2, pt. 5 of the Montana Uniform Probate Code states that the wills section of the Code "provides for a more formal method of execution with acknowledgment before a public officer (the self-proved will)."

42. 2 BOWE & PARKER, PAGE ON WILLS §§ 19.133, 19.134 (3d ed. 1960).

While requiring testimony of the subscribing witnesses is contrary to the main purpose of a self-proved will, by such testimony the court is provided with an alternative to the rejection of what may otherwise be a perfectly clear and unobjectionable indication of the testator's intent.

To avoid a result similar to that in *Sample,* the drafter of a will in Montana must be certain to comply with the requirements of execution as provided in MCA § 72-2-302 (1978).[43] A properly executed will must contain an attestation clause signed by two witnesses. Care should be taken when the optional self-proving affidavit is included with the will: each witness must sign twice, once in the attestation clause and again in the self-proving affidavit. While use of the self-proving affidavit is optional, it should be included in every will because it eliminates the necessity of testimony by the witnesses to the will if the will is contested. If both the attestation clause and the self-proving affidavit are properly signed, the problem presented in *Sample* can be easily avoided.

43. Formerly codified at R.C.M. 1947, § 91A-2-502.